

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
PATRICK JOSEPH BRADY,) No. 00-30715DM
Debtor.) Chapter 11
_____)
PATRICK JOSEPH BRADY,) Adversary Proceeding
Plaintiff,) No. 00-3257DM
_____)
v.)
MAX KEECH and CHICAGO TITLE COMPANY,)
INC.,)
Defendants.)
_____)

MEMORANDUM DECISION

I. Introduction

In this adversary proceeding plaintiff, Patrick Joseph Brady ("Brady"), filed a Second Amended Complaint For Turnover Of Property Of The Bankruptcy Estate, Breach Of Contract And Declaratory Relief (the "Complaint") on March 26, 2001. In the Complaint Brady seeks turnover of \$80,000 (the "\$80,000 Deposit") deposited by defendant Max Keech ("Keech") with defendant Chicago Title Company, Inc. ("Chicago Title") as liquidated damages in a purchase contract described below. The purchase contract related to an aborted sale of Brady's property at 8 Cedar Lane, Woodside,

1 California (the "Property"), to Keech. Brady also seeks interest
2 at the rate of 10% per annum on the \$80,000 Deposit from the date
3 Keech rescinded the purchase contract and a declaration that the
4 \$80,000 Deposit (remaining on deposit at Chicago Title) belongs to
5 him. He also claims attorneys fees and costs per the purchase
6 contract.

7 By way of Answer and Counterclaim, Keech denies the material
8 allegations of the Complaint, sets forth affirmative defenses,
9 seeks a declaration that he timely rescinded the purchase
10 contract, that the \$80,000 Deposit should be returned to him plus
11 interest at the rate of 7% per annum, and that he should be
12 awarded exemplary damages and attorneys fees and costs.

13 Trial was held on August 27, 28 and 29, and September 5,
14 2001. Brady appeared and was represented by David A. Boone, Esq.
15 and Edward A. Kunnes, Esq., two of his attorneys; Keech appeared
16 and was represented by Peter G. Riechert, Esq., one of his
17 attorneys; Chicago Title did not participate in the trial.

18 The court has reviewed the extensive oral and documentary
19 evidence presented by the parties, and has considered the trial
20 briefs and arguments of counsel. For the reasons set forth below,
21 the court concludes that Brady is not entitled to any recovery on
22 the Complaint; that Keech had a common law right to rescind the
23 purchase contract; that he is entitled to a return of the \$80,000
24 Deposit, together with interest at the rate of 7% per annum; and
25 that he is entitled to recover reasonable attorneys fees¹ for his
26

27 ¹ Paragraph 16C of the purchase contract that is the subject
28 of this dispute contains a typical prevailing party attorneys fees
provision. Interestingly, paragraph 5, initialed by both parties,

1 successful defense of the Complaint and prosecution of the
2 Counterclaim. He is not entitled to exemplary damages.²

3 II. Facts³

4 Brady commenced a Chapter 11 case in this court on March 21,
5 2000 and at all times material thereafter continued as a debtor in
6 possession, no trustee having been appointed. The principal
7 reason he filed Chapter 11 was to avert a foreclosure of the
8 Property. By a series of events not relevant to this dispute, the
9 court directed that the holder of the first deed of trust on the
10 Property be paid in full by November 17, 2000, or it would be
11 permitted to foreclose promptly after that date. On October 11,
12 2000 Brady listed the Property for sale through Fine Homes and
13 Estates-Seville Contempo ("Seville Contempo"), of Menlo Park,
14 California. Michelle C. Adams ("Adams") was the real estate agent
15 from Seville Contempo who handled the listing.

16 _____
17 provides for binding arbitration. Both parties waived arbitration
18 at the commencement of trial.

19 ² Keech claims in the alternative to his common law rights
20 that under Cal. Civ. Code §§ 1102, et seq., he had a three day
21 right to rescind the purchase contract under the last paragraph of
22 Civ. Code § 1102.3 beginning on November 8, 2000. This
23 alternative theory is not available to him, however, because Cal.
24 Civ. Code § 1102.2(b) exempts from the operative sections of the
25 Civil Code providing a statutory right to rescind, sales by
26 trustees in bankruptcy. Brady, as a Chapter 11 debtor in
27 possession, has the rights, powers and duties of a trustee in
28 bankruptcy under Bankr. Code § 1107(a) (11 U.S.C. § 1107(a)).
Thus, this alternative theory of Keech is rejected and will not be
discussed further in this Memorandum Decision. Nor will the court
respond to Keech's argument that Brady was in breach because he
did not timely obtain a court order authorizing the sale and did
not sign escrow instructions when he was supposed to. There is no
reason to address these issues in view of the court's decision in
Keech's favor.

³ The following discussion constitutes the court's findings
of fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

1 Brady had been restoring and remodeling the Property over
2 several years, beginning in 1991. By October, 2000, when he was
3 under extreme time pressure to sell, various permits with the Town
4 of Woodside ("Woodside") were due to expire shortly. The entire
5 remodel was far from complete. Several items needed to be
6 completed in the main house, roof installation needed to be
7 completed at the stable/garage and the guest house, and various
8 other items that were contemplated in the plans approved by
9 Woodside remained to be accomplished. A number of conditions
10 precedent to Woodside's final approval of the project needed to be
11 satisfied.

12 Adams held an open house at the Property on October 22, 2000,
13 the first date on which Keech visited the Property. The
14 advertised list price was \$2,400,000. On the evening of October
15 22, interested bidders were invited to Seville Contempo to submit
16 offers to purchase the Property. Keech attended the meeting at
17 Seville Contempo and at that meeting was provided with numerous
18 documents in a disclosure packet prepared by Adams.⁴ A flyer
19 prepared by Adams included the following description of a second
20 floor attic at the main house on the Property: "Upstairs ... an
21 extra large utility room with water heater and furnace." Keech
22 received this flyer. In another flyer Adams represented that the
23 garage included a "Finished loft."

24 On October 22, Paul Pittman and Julie Levenson (together,
25

26 ⁴ The particular documents included in the disclosure packet
27 which are pertinent to the court's decision will be discussed in
28 more detail, *supra*. Significantly, the packet did not include a
copy of Woodside's October 25, 1990 conditions of approval of the
remodel.

1 "the Pittmans") submitted an offer of \$2,500,000 for the Property,
2 which included what Brady's counsel described as a "sharp bid" of
3 \$50,000, not to exceed \$3,050,000.⁵ In reliance on Keech's
4 promise to submit an offer the following day, Brady did not accept
5 the Pittmans' offer nor any other offer submitted by other
6 interested parties. On October 23, Keech submitted an offer of
7 \$2,625,000, which offer included an Addendum #2 prepared by Adams
8 on Seville Contempo letterhead. Addendum #2 contained a statement
9 that:

10 "All Buyers and potential Buyers will visit the City of
11 Woodside Building Department and all other pertinent
12 departments to satisfy their own needs to decide whether to
purchase the property. All sales are AS IS and all offers
will include an AS IS addendum."

13 Keech also initialed a document provided by Adams entitled
14 "Market Conditions Advisory." That document contained a paragraph
15 under a heading "Non-Contingent Offers," stating:

16 "A non-contingent offer means that the buyer will proceed
17 with the purchase of the property (or, if the buyer fails to
do so, possibly paying damages to the seller such as the
deposit money) regardless of what the buyer may learn about
18 the condition of the property prior to the close of escrow
and regardless of whether the buyer's financing is available
19 or approved by the lender. Some sellers are insisting that
the contract be non-contingent."

20 Keech's offer included the following at paragraph 19: "Seller
21 to provide plans and specifications and transfer building
22 permits." It also stated that "buyer accepts Addendum #2."

23 On October 23, Brady countered Keech's and the Pittmans'
24 offers. Keech increased his offer to \$2,650,000. Brady did not
25 respond, but he and the Pittmans exchanged further counter-offers
26

27 ⁵ The bid indicated that the Pittmans would pay \$50,000 over
28 the highest offer, not to exceed \$3,050,000. The highest offer
was to be verified by Adams.

1 and on October 25, entered into an agreement for sale of the
2 Property at a price of \$2,850,000. After considering the matter
3 further, Keech decided to increase his offer. On October 25, he
4 and his real estate agent, Anne Pearson ("Pearson"), prepared a
5 PRDS Real Estate Purchase Contract for Keech to purchase the
6 Property for \$2,850,000. Around noon of that day they both
7 proceeded to Seville Contempo in Menlo Park, intending to present
8 that new offer. After some delay they were advised by one of
9 Seville Contempo's brokers, Barbara Silverberg, that Seville
10 Contempo's counsel had confirmed that Brady was in contact with
11 the Pittmans and could not consider an offer from Keech.

12 The Pittmans refused to remove their contingencies on October
13 30, instead reducing their offer to purchase the Property to
14 \$2,750,000. On that same day Keech interlineated the form that he
15 had originally prepared on October 25, 2000. He inserted the date
16 of October 30, left the price at \$2,850,000 and noted that "Buyer
17 takes property 'as is'" and "this offer is non-contingent." These
18 terms were inserted in paragraph 19 of the form; Keech deleted the
19 requirement that the seller provide the plans and specifications
20 and transfer building permits, and also the acknowledgment of
21 receipt of Addendum #2. Pearson presented the latest Keech offer
22 to Adams that evening.

23 Brady countered Keech's October 30th offer the next day,
24 noting that his acceptance was "subject to releases of prior
25 contract" (the Pittmans' contract), that escrow would close on
26 November 9, 2000, and that the sale was "subject to court
27 approval." He also included as a term that "buyer has prior to
28 acceptance received, read and acknowledged in writing buyer's

1 receipt of SSC and TDS."⁶ Keech accepted Brady's counter-offer on
2 November 1, at which time the parties were in contract.⁷ There is
3 no evidence that the Pittmans' contract was not released, so
4 nothing prevented Brady and Keech from becoming bound by their
5 contract.

6 The SSC and the TDS are replete with warnings to buyers about
7 Brady's intention to disclaim any responsibility for the
8 conditions at the Property or requirements of Woodside. For
9 example, the original version of the TDS contained a statement
10 that "... all items to be checked by buyer, new construction,
11 remodeling, etc. have been done." The original SSC repeatedly
12 used phrases such as "As-Is" and "check for yourself." Even the
13 flyer prepared by Adams stated that "Buyers to verify permits:
14 completed or not completed for themselves (sic)."

15 There were multiple versions of the SSC and the TDS prepared
16 by Brady and/or Adams at various times but the particular TDS
17 alluded to in the Purchase Contract and referred to in this
18 Memorandum Decision was dated as of October 25, 2000 and signed by
19 Keech on November 1, 2000 (Trial Ex. 39). The SSC referred to in
20 this Memorandum Decision was prepared as of October 11, but
21 revised as of October 25, 2000, and also initialed by Keech (Trial
22
23
24

25 ⁶ There is no dispute that "SSC" refers to a TRDS
26 Supplemental Seller's Checklist and that "TDS" refers to Transfer
27 Disclosure Statement.

28 ⁷ For convenience, this contract will be referred to
hereafter as the "Purchase Contract."

1 Ex. 40).⁸

2 Adams prepared and Keech acknowledged an Agent's Checklist
3 that was referred to in the TDS, having originally been prepared
4 on October 11, 2000, and revised as of October 25, 2000.

5 Brady insists that a full set of the plans was available at
6 the Property on several occasions when Keech was there. However,
7 Keech did not receive any plans, even those that were reduced in
8 size, until October 31. By November 1, when the Purchase Contract
9 was in effect, he had a full size set.⁹

10 Between November 1, and November 7, Keech became aware of
11 various problems with the Property. In particular, he claims to
12 have learned for the first time that noise from Roberts Market, a
13 supermarket adjacent to the Property, was excessive and that
14 deliveries of grocery supplies and pick-ups by garbage trucks
15 occurred very early in the morning, even on weekends. He also
16 discovered problems with a fence running along the north side of
17 the Property, adjacent to a creek. He was advised that Woodside
18 had ordered the fence relocated. Keech discovered that parts of
19 the first and second floors of the main house were not built
20 according to plans and that there was no laundry room. Other
21 discrepancies are discussed, infra.

22 On November 7, Pearson advised Adams that Keech rescinded his
23

24 ⁸ In this document Brady disclosed for the first time that
25 the "heating system is not shown on the plan in it's (sic) current
location."

26 ⁹ The court rejects as not credible Brady's testimony that
27 prior to execution of the Purchase Contract, Keech had a set of
28 plans that were smaller than the full size set, but larger than
the set that Adams maintains was available with her disclosure
packet.

1 offer to purchase the Property as reflected in the Purchase
2 Contract. Pearson based Keech's right to rescind on the revised
3 TDS and revised SSC, contending that many items had not been
4 previously disclosed or were improperly disclosed. Based upon
5 those conditions, Pearson mentioned Keech's willingness to
6 renegotiate the price, failing which he requested a refund of the
7 \$80,000 Deposit.

8 After Pearson's November 7th letter rescinding the Purchase
9 Contract, Adams faxed to Pearson an Agent's Checklist-1A, revised
10 as of November 8, 2000. Adams asked that these be signed and
11 returned with "the balance of the TDS and the six page Supplement
12 with your addendums or counters or new offers." Thus, revised
13 Addendum-1A clearly was to be incorporated into the October 25,
14 2000 TDS. It now disclosed: that the upstairs plans for the main
15 house did not match the built structure; the rear fence was
16 located too close to the creek; truck deliveries at Roberts Market
17 started as early as 6:00 a.m.; the six car garage could only be a
18 three car garage and barn; and the second floor of the garage/barn
19 could not be use for habitation.

20 On November 9, Brady demanded that Keech close the escrow,
21 although by that same date he had not executed a deed, signed
22 escrow instructions, or provided Keech with a court order
23 approving the sale to him. Also on November 9, Brady received a
24 new offer from the Pittmans to purchase the Property for
25 \$2,500,000; he countered that offer and after a series of further
26 counteroffers Brady and the Pittmans arrived at an agreed price of
27 \$2,650,000, which is the price at which the Property was sold to
28 the Pittmans. On November 9, 2000 Keech presented an offer to

1 purchase the Property for \$2,500,000. Brady did not respond.

2 III. Analysis

3 Nearly forty years ago a California Court of Appeals
4 established the proposition that an "As Is" label does not relieve
5 a seller of property of the duty of disclosure of material facts.
6 In Lingsch v. Savage, 213 Cal. App. 2d 729 (1963), purchasers of
7 real estate sued the seller and the seller's broker, alleging a
8 state of disrepair and the fact that the units being sold were
9 illegal and that the building had been placed for condemnation by
10 city officials. Plaintiffs did not discover those conditions and
11 charged the defendants with willfully and fraudulently failing to
12 reveal them, causing plaintiffs justifiably to rely on their
13 nondisclosure. The contract between the purchasers and the
14 sellers stated that the property was to be sold "in its present
15 state and condition" and the sellers recited that no
16 representations, guaranties or warranties of any kind have been
17 made (except as expressed therein).

18 The trial court sustained a demurrer, but on appeal the court
19 reversed, noting that even in the absence of active fraud or
20 active concealment, mere nondisclosure rather than active
21 concealment, amounts to fraud. Lingsch, 213 Cal. App. 2d at 734.
22 The court went on to rely on provisions of the California Civil
23 Code which stood for the proposition that suppression of a fact by
24 one bound to disclose it willfully deceives the other party.
25 Failure of the seller to fulfill such duty of disclosure
26 constitutes actual fraud. Id. at 735.

27 The elements of a cause of action for damages for fraud based
28 on nondisclosure, and involving no confidential relationship, was

1 said to be the following: nondisclosure of facts materially
2 affecting the value or desirability of the property; [the
3 seller's] knowledge of such facts and of their being unknown to or
4 beyond the reach [the buyer]; [the seller's] intention to induce
5 action by [the buyer]; inducement of [the buyer] to act by reason
6 of the nondisclosure; and resulting damages. Id. at 738. In
7 dealing with the seller's contention that the purchasers took the
8 property "As Is," the court disposed of that by indicating that
9 the "As Is" presupposes a reliance on representations that had
10 been made. Noting that no prior California case had been located
11 which gave precise definition to an "As Is" provision when
12 included in the agreement for the sale of property, the court
13 stated the following:

14 "We are of the opinion that, generally speaking, such a
15 provision means that the buyer takes the property in the
16 condition visible to or observable by him. (Citation
17 omitted.) Where the seller actively misrepresents the then
18 condition of the property (citation omitted) or fails to
19 disclose the true facts of its condition not within the
20 buyer's reach and affecting the value or desirability of the
21 property, an 'as is' provision is ineffective to relieve the
22 seller of either his 'affirmative' or 'negative' fraud. In
23 either situation the seller's conduct has, as it were,
24 infected the buyer's knowledge of the condition of the
property. An 'as is' provision may therefore be effective as
to a dilapidated stairway but not as to a missing structural
member, a subterranean creek in the backyard or an unexploded
bomb buried in the basement, all being known to the seller.
We feel that such a view of an 'as is' provision not only
makes good sense but equates sound law with good morals. To
enlarge the meaning of such a provision so as to make it
operative against all charges of fraud would be to permit the
seller to contract against his own fraud contrary to existing
law. (Citation omitted.)"

25 213 Cal. App. 2d at 742.¹⁰

26 In Driver v. Melone, 11 Cal. App. 3d 746 (1970), the court

28 ¹⁰ See, also, Cal. Civil Code section 1689(b).

1 found that a sophisticated buyer knew all that the seller knew,
2 and thus there was no misrepresentation. But in Katz v.
3 Department of Real Estate (96 Cal. App. 3d 895) (1979), the court
4 upheld a real estate broker's license suspension because the
5 broker had a duty to disclose a code violation not readily
6 apparent. The fact that the buyer of the property was acquiring
7 it "as is" was not sufficient to exonerate the broker.

8 While there is a great deal of evidence concerning the
9 condition of the Property, the state of affairs at Woodside
10 concerning Brady's permits and obligations and what was disclosed
11 to whom and when, this case really comes down to whether Brady can
12 rely on the fact that he insisted that Keech investigate for
13 himself all of the conditions at the Property and any requirements
14 of Woodside. Brady says that Keech had ample opportunity to
15 determine what was required, and that the disclosures were
16 adequate, either by what Keech knew or could readily determine, or
17 by what was set forth in the various documents provided to him.
18 Brady does not deny the existence of some of the nonconforming
19 conditions, but rather claims that they are either immaterial or
20 Keech knew of them and cannot now avoid loss of the \$80,000
21 Deposit as liquidated damages because of the lower price at which
22 Brady ultimately sold the Property to the Pittmans.

23 On the other hand Keech contends that Brady had an
24 affirmative duty to disclose to him the very conditions on which
25 he claims a right to rescind whether or not those conditions could
26 have been discovered by Keech.

27 Based on the Lingsch factors, Brady's admonitions to Keech
28 (and others) to check things for himself may have been adequate

1 had Brady been unaware of the conditions themselves. But because
2 he knew the true state of affairs, he cannot shift the risk of
3 non-disclosure to Keech. As noted below, Brady concealed certain
4 material facts affecting the value or desirability (to Keech) of
5 the Property; the only inference the court can draw from this
6 concealment is that it induced Keech to offer what he did, and had
7 there not been a rescission, Keech would have suffered damages in
8 that he would not have received the benefit of his bargain as
9 agreed in the Purchase Contract. The specifics of Brady's
10 material non-disclosure will be discussed in turn.

11 Preliminarily the court notes that in general, where Keech or
12 some of his colleagues recall the facts one way, and Brady recalls
13 them the other way, Keech and the others are far more convincing.
14 Brady's testimony lacks convincing credibility in many respects.
15 He changed position on certain matters and was imprecise about
16 dates such as when he first obtained the permits, when he made
17 modifications to the fences, when he met Keech and others at the
18 Property, etc.¹¹ For this reason, and the court's own observation
19 of the witnesses, Brady's testimony has been discounted in the
20 face of contrary testimony from his opponents.

21 Brady also argues that the non-contingent nature of Keech's
22 October 30 offer obligated Keech to perform. But the waiver of
23 contingencies, such as financing, further inspections, etc., has

24
25 ¹¹ For example, Brady says that Keech was nowhere to be
26 found during the first week of November, immediately after
27 execution of the Purchase Contract. The evidence is overwhelming
28 that Keech was at the Property on November 1, 2, 3, 4 and 6.
Another example: Brady testified that all deviations from the
approved plans were inspected and approved. That is not even
close to the truth.

1 nothing to do with a seller's duty to disclose material facts.
2 The language of the Non-Contingent Offers portion of the Market
3 Condition Advisory Keech initialed with his original offer is of
4 doubtful validity, and cannot overcome Brady's duty under Lingsch
5 and Katz to make full disclosure of material facts. Keech is
6 sophisticated and experienced in real estate matters. Unlike the
7 buyer in Driver, however, Keech did not know what Brady knew.

8 1. The Mountain Home Road Gate And Access To The
9 Property.

10 The Property sits on an acre of land bounded by Cedar Lane to
11 the south and Mountain Home Road to the east. A fully functional
12 driveway comes in from Cedar Lane and approaches the main house.
13 A gate on Mountain Home Road opens to a second driveway which
14 leads directly to the garage/stable. It had been ordered closed
15 by Woodside in the October 25, 1990 conditions of approval. Brady
16 was advised by the planning director of Woodside that the
17 "driveway off Mountain Home Road be removed with the opening
18 fenced and landscaped to reduce the visibility of the proposed
19 garage/stable." Notwithstanding this requirement, which Brady did
20 not disclose to Keech, the Agent's Checklist of October 11, 2000
21 that accompanied the original TDS of that date, and which was
22 provided to Keech, stated without qualification that there were "2
23 sets of gates" at the Property.¹² Brady maintains that the small
24 plans provided to Keech, consistent with the full size plans,
25 reveal the requirement that the Mountain Home Road gate and
26 driveway were to be handled as required by Woodside. However, an

27 ¹² Surprisingly, Adams' November 8th revised Agent's
28 Checklist was still silent on the requirement that the Mountain
Home Road gate be closed and the driveway eliminated.

1 examination of those plans shows only the barely legible words
2 "close gate" and some other not fully legible words on the large
3 plan that begin with "remove" followed by what might be the word
4 "driveway." This is hardly adequate and is a material
5 nondisclosure which by itself may be sufficient to give Keech the
6 right to rescind the Purchase Contract.¹³ While it is true that
7 Keech could have found the conditions of approval in Woodside's
8 files, he was justified in relying, under Lingsch, on Brady's
9 silence and the Agent's Checklist's misstatement.

10 2. Noise From Robert's Market.

11 Among Keech's grievances is his contention that he did not
12 realize that there would be truck deliveries or garbage pickups as
13 early 6:00 a.m. at Robert's Market. The court believes that Brady
14 should have been more revealing about this condition than simply
15 reporting in the SSC that the Property "... is close to town noise
16 can occur." Nevertheless, Keech is familiar with Woodside, is
17 aware of the size and clientele of Robert's Market, including the
18 fact that it is open every day. Anyone with any real world
19 experience has to know that supermarkets take deliveries and get
20 rid of their garbage at times other than when they are open for
21 business. Thus the failure of Brady to make a specific disclosure
22 concerning Robert's Market does not entitle Keech to rescind the
23 Purchase Contract.

24 3. Windows Or French Doors In The Living Room.

25 Much was made of the fact that the plans for the main house's

26 ¹³ Brady makes much of the fact that Keech really wanted to
27 use the Mountain Home Road gate so that he could get a more
28 fashionable address. Keech's motives are irrelevant; what matters
is the materiality of the nondisclosure.

1 living room show windows where french doors have been installed.
2 Substantial remodeling has been underway and the difference
3 between a window or french door is minimal from a planning point
4 of view. Correcting the plans to conform to an actual condition
5 such as this is a relatively routine matter typically handled by
6 the planning or building department without any complication.
7 Keech knew he was going to have to deal with some modifications to
8 the plans. This error in disclosure by Brady was immaterial.

9 4. Pool Ramp/Retaining Wall.

10 From the evidence presented the court cannot ascertain
11 whether this is a material nonconforming matter that should be a
12 basis to permit Keech to rescind. Thus the court will disregard
13 Keech's arguments on this point.

14 5. Garage/Stable Loft.

15 Woodside does not permit second stories in structures such as
16 the garage/stable at the Property. The plans call for a loft yet
17 Brady finished much of the second level inside the stable, adding
18 sheetrock, wiring, lighting, and the beginnings of permanent
19 flooring. His written materials were consistent with the
20 representation that the space could be used for an office or some
21 other form of living space. It was reasonable for Keech to
22 believe that that was an appropriate purpose, particularly because
23 Brady made misleading representations that changes from the plans
24 had been inspected by Woodside. Brady's failure to make
25 disclosure of the loft situation was material.

26 6. Attic/Utility Room.

27 In a space in the main house adjacent to an upstairs bedroom,
28 Brady made additions to what was described as the "attic space,"

1 installing a furnace (in addition to a water heater shown on the
2 plans), finishing the walls, installing recessed lighting and
3 electrical and telephone outlets. This is the utility room
4 described in the flyer Adams prepared. Brady informed Keech that
5 this space could be made liveable and his cryptic remarks about
6 the heating system's location (see fn. 8) was insufficient to put
7 Keech on notice that this was a nonconforming condition at the
8 main house. Woodside has not approved the location of the furnace
9 in this space. Brady also informed Keech that this space could be
10 made liveable, a condition not evident from the plans. Brady's
11 failure to make adequate disclosure of the attic/utility room
12 situation was material.

13 7. Moved Upstairs Hallway.

14 From the evidence presented the court cannot ascertain
15 whether this is a material nonconforming matter that should be a
16 basis to permit Keech to rescind. Thus the court will disregard
17 Keech's arguments on this point.

18 8. Fence Problems.

19 The court received a great deal of evidence concerning the
20 history of at least two fences, the fence parallel to the creek to
21 the north, and another fence on the west side of the Property. It
22 is the former fence that is the point of significant dispute
23 between Brady and Keech. Brady testified that the fence in fact
24 appears where it is shown to be on the actual plans for the
25 Property. Notwithstanding that testimony, later in the trial
26 counsel for both sides stipulated that the fence is not as it
27 appears on the plans. Thus, either the fence is in the wrong
28 position or it is drawn to be in the wrong position on the plans.

1 On February 28, 1992 Woodside's Assistant Planner and Code
2 Enforcement Officer, David Rizk, advised Brady in writing that he
3 had observed Brady building "... a new fence which is closer to
4 the creek to the rear of your property." A short time later on
5 March 27, 1992, Mr. Rizk wrote again that the new fence was "five
6 to eight feet closer to the creek than" the previous fence. Mr
7 Rizk then warned Brady that before any further processing of
8 permits for the structure could occur, the fence had to be
9 relocated.

10 Brady testified with a great deal of confidence that he
11 concluded that the dispute with Mr. Rizk about the location of the
12 fence was resolved because he later got his permits. But his
13 getting the permits did not really solve the fence problem.
14 Indeed, Mr. Rizk testified that the suggestion that future permits
15 could be held hostage pending repair of the fence was itself an
16 error. The controversy is compounded by the fact that Woodside
17 has in effect a setback ordinance which dictates minimum distances
18 fences such as this must be from creeks. Brady counters by
19 arguing, probably correctly, that his fence was "grandfathered"
20 and did not need to comply with any such ordinance. But the fact
21 is the controversy remains unresolved. Thus, even if Brady would
22 ultimately prevail in any dispute with Woodside over the setback
23 ordinance, he had to make Keech aware of the ongoing problems. It
24 is also more likely than not that there would have to be some
25 relocation of the fence at Keech's expense. This possibility,
26 coupled with the fact that the fence was an item of contention
27 between Brady and Woodside, was reason enough to make a full and
28 adequate disclosure and let Keech make his own decision on how

1 best to act. Brady's failure to make adequate disclosure of the
2 fence problems was material.

3 9. Condition Of The Roofs.

4 Brady relies on a permit that noted that "roof nailing" could
5 be revised for slate. On this thin foundation he bases his
6 argument that the presence of slate roofing materials on the guest
7 house were effectively approved notwithstanding the fact that the
8 plans called for cedar shake roof materials. The testimony was
9 convincing that the substitution of slate in place of cedar shake
10 is not immaterial, primarily because of the incomplete information
11 concerning the structural capacity of the guest house to handle a
12 heavier roofing material. Brady represented to Keech that the
13 changes had been inspected and, unlike something as relatively
14 insignificant as windows and french doors, or the movement of the
15 upstairs interior hallway, this information concerning the state
16 of the roof is important. Brady's failure to make adequate
17 disclosure of the roof problems was material.

18 In sum, the failure of Brady to disclose the problems with
19 the driveway gate on Mountain Home Road, the misrepresentations
20 concerning the usefulness of the second level in the
21 garage/stable, the problems with the fence, and the nonconformity
22 of the roofs, constituted material misrepresentations entitling
23 Keech to rescind. Under Lingsch, the "As Is" terms agreed to by
24 Keech will not prevent the conclusion that Keech may use Brady's
25 fraud as a basis to rescind the Purchase Contract. The doctrine
26 of "Caveat Emptor" is not available to Brady under the facts
27 presented.

1 IV. Disposition

2 In view of the foregoing, Keech is entitled to a refund of
3 the \$80,000 Deposit, plus interest at 7% per annum from November
4 7, 2000. He is not entitled to exemplary damages since he has not
5 demonstrated that Brady acted with the requisite malice or
6 willfulness required by California law. He is entitled to recover
7 his attorneys fees, which should be handled in accordance with the
8 local rules of practice of this court.

9 Counsel for Keech should submit a form of judgment¹⁴
10 consistent with this Memorandum Decision, and should comply with
11 B.L.R. 9002-1.

12 Dated: October 1, 2001

13 s/ _____
14 Dennis Montali
United States Bankruptcy Judge

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25
26 ¹⁴ The judgment should direct Chicago Title to pay to Keech
27 the \$80,000 Deposit, plus whatever interest has been earned on it;
28 Brady will be obligated to pay Keech any additional amount
necessary for Keech to realize 7% on \$80,000 from November 7, 2000
to the date of the judgment.